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August 29, 2001

VIA FACSIMILE

Michael Holzmiller, Director of Planning
Don Neu, Senior Planner
City of Carlsbad Planning Department
1635 Faraday Ave.
Carlsbad, CA 92008

Re: Planning Commission Consideration of Villages of La Costa Project

Dear Messrs. Holzmiller and Neu:

This letter is submitted on behalf of Canyons Network, the Sierra Club, and the Center for Biological Diversity to provide comments concerning the proposed Villages of La Costa development project ("Project"). These comments are a result of the recently released Staff Report to the Carlsbad Planning Commission concerning the Project ("Staff Report"), as well as the Final Environmental Impact Report ("FEIR"). As such, they are intended to supplement prior comments concerning the Project. In a letter from this office dated March 26, 2001, numerous inadequacies and problems were noted with the City's environmental analysis and with the Project. The FEIR and Staff Report confirm these failings, and they raise additional problems.

The Staff Report indicates that a portion of Melrose Drive south of Rancho Santa Fe Road is likely to be improved only to secondary arterial standards, "as it does not appear that the City of Encinitas will extend this roadway into the Olivenhain area." Staff Report at 17. This statement provides further support for the critique that the FEIR failed to analyze adequately transportation impacts. The Staff Report's statement conflicts with the FEIR's traffic analysis, which assumes a major arterial along this stretch of roadway. *See e.g.*, FEIR at Figure 4.7-5.

The Staff Report also states that the Carlsbad Fire Department has developed additional standards for fire protection. Staff Report at 18. These standards and their significant impacts upon biological resources, as well as other impacts, were not analyzed by the FEIR. *See e.g.*, FEIR at Comments and Response to Comments ## 240 - 242.

The Draft Findings of Fact included with the Staff Report indicate that manufactured slopes will be created that are more than 20 feet in height and 200 feet in length. Draft Findings at 30. Yet no mitigation measures are proposed that will eliminate this significant impact.

FEIR Response to Comments ## 31 and 33 indicates that additional water facilities, including a new reservoir, will need to be constructed. These facilities were not analyzed in the FEIR, including their impacts upon biological and other resources.

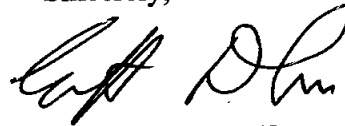
FEIR Response to Comment # 36 states that ownership disclosure is adequate mitigation for the significant impact associated with potential dam failure flooding to property near the Mahr Reservoir. This mitigation is clearly not sufficient and on its face fails to address this significant impact of the Project.

Finally, on May 31, 2001, Canyons Network, the Sierra Club, and the Center for Biological Diversity filed suit in federal district court in San Diego against the U.S. Department of the Interior and its Secretary over their failure to comply with the Endangered Species Act and National Environmental Policy Act in preparing and adopting the Habitat Conservation Plan ("HCP") and related actions associated with this development project. A copy of the complaint is enclosed for your convenience. In significant part, the plaintiffs in that action seek to have the HCP and related approvals declared invalid and revoked.

For these reasons and for those stated in prior correspondence, Canyons Network, the Sierra Club, and the Center for Biological Diversity request that the City disapprove the Project and pursue appropriate alternatives.

I respectfully request that you provide copies of this letter to all Planning Commission members prior to tonight's hearing. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Everett DeLano', written in a cursive style.

Everett DeLano, Esq.

Encl.

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5 Attorney for Plaintiffs
6 CANYONS NETWORK,
7 SIERRA CLUB, and
8 CENTER FOR BIOLOGICAL DIVERSITY

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11
12 CANYONS NETWORK, SIERRA CLUB, and
13 CENTER FOR BIOLOGICAL DIVERSITY,
14 Plaintiffs,

15 v.

16 GALE NORTON, in her official capacity as
17 Secretary of the U.S. Department of the Interior,
18 and the UNITED STATES DEPARTMENT OF
19 THE INTERIOR,
20 Defendants.

Case No.

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

21 STATEMENT OF THE CASE

22 1. Plaintiffs Canyons Network, Sierra Club, and Center for Biological Diversity bring this action
23 against Defendants Gale Norton, in her official capacity as Secretary of Interior, and the United States
24 Department of the Interior in order to correct Defendants' violations of the Administrative Procedure
25 Act, 5 U.S.C. § 701 *et seq.* ("APA"), the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"),
26 and the National Environmental Policy Act, 42 U.S.C. § 4332 ("NEPA"). Defendants' violations
27 threaten the conservation, survival and recovery of imperiled plant and animal species and their habitats.
28 Plaintiffs seek revocation of Defendants' actions allowing loss of species and habitat and an order from
this Court requiring Defendants to comply with federal law.

2. Plaintiffs challenge the following actions by Defendants as in violation of the ESA, APA and NEPA:

- (a) Approval of a Habitat Conservation Plan ("HCP") for Fieldstone/La Costa Associates and the City of Carlsbad;
- (b) Issuance of an Incidental Take Permit ("ITP") in connection with the HCP;
- (c) Approval of an Implementation Agreement ("IA") in connection with the HCP;
- (d) Issuance of a Biological Opinion ("BO") concluding that the HCP and ITP would not jeopardize the existence of any of the plant and animal species covered by the HCP; and
- (e) issuance of an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") finding that the HCP and ITP would have no significant environmental effect.

3. Defendants' actions will lead to the destruction and adverse modification of several important areas of habitat for several critical species, and will result in harm and the "take" of listed species, in violation of the ESA, APA and NEPA. Defendants have failed to analyze the impacts associated with its decisions and approvals of the HCP, ITP, IA, BO, EA and FONSI, in violation of the ESA, APA and NEPA. Plaintiffs seek to remedy Defendants' violations of the law in order to ensure that appropriate steps are taken to protect the region's natural resources.

PARTIES

4. Plaintiff Canyons Network is an unincorporated association formed in 1997 in Carlsbad, California. Canyons Network has over 250 members. The goals of Canyons Network are to preserve community and environmental resources in northern San Diego County and to combat the effects of urban sprawl. Canyons Network accomplishes its mission by holding regular meetings to address issues and educate the public about environmental threats to the region's natural resources and by holding a variety of educational and related activities, including walks in and around the Plan area and the sale of t-shirts and other items to raise community awareness. Canyons Network volunteers have collected over 7,500 signatures in support of maintaining the Box Canyon area as a protected location. Canyons Network seeks to protect the area's natural resources from destruction or adverse modification.

5. Plaintiff Sierra Club is a national non-profit organization of approximately 600,000 members dedicated to exploring, enjoying, and protecting wild places of the earth, to practicing and promoting the

1 responsible use of the earth's ecosystems and resources, to educating and enlisting humanity to protect
2 and restore the quality of the natural and human environment, and to using all lawful means to carry out
3 these objectives. The Sierra Club's interest and concerns stem from its continued involvement in the
4 development of appropriate conservation plans for San Diego County, including northern San Diego
5 County's natural habitats. The San Diego chapter of the Sierra Club has over 14,000 members, many of
6 whom have been actively involved in efforts to protect and preserve this area's natural resources.

7 6. Plaintiff Center for Biological Diversity ("CBD") is a non-profit public interest corporation,
8 with over 5,000 members and offices in San Diego and Berkeley, California, Tucson and Phoenix,
9 Arizona, and Silver City, New Mexico. CBD and its members are dedicated to protecting the diverse
10 life forms and habitats of western North America, through science, policy, education and environmental
11 law. CBD has been active in efforts to ensure the appropriate protection of the plant and animal species
12 affected by the proposed project.

13 7. Each of the Plaintiffs and their members have been injured as a result of Defendants' actions.
14 Plaintiffs' members use, enjoy and benefit from the species and habitats affected by Defendants' actions.
15 Defendants' actions adversely affect the recreational, aesthetic, scientific, and environmental interests of
16 Plaintiffs and of Plaintiffs' members. The interests of Plaintiffs and Plaintiffs' members has been and
17 will continue to be adversely affected by Defendants' unlawful actions in violation of the ESA, APA
18 and NEPA. The relief sought in this Complaint would redress Plaintiffs' and Plaintiffs' members'
19 injuries by requiring that the effects of development and loss of species and habitats be properly
20 minimized and mitigated and otherwise remedied.

21 8. Defendant Gale Norton is sued in her official capacity as Secretary of Interior. She is legally
22 responsible for all decisions of the U.S. Fish and Wildlife Service ("FWS"), including those
23 implementing the ESA, APA and NEPA. Defendant U.S. Department of the Interior is the federal
24 department that oversees the operations of FWS, including those implementing the ESA, APA and
25 NEPA.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over the claims set forth in this Complaint under 28 U.S.C. § 1331 (federal question), 16 U.S.C. § 1540(c) (actions arising under the Endangered Species Act), and 5 U.S.C. §§ 701 – 06 (judicial review of agency action).

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

STATUTORY BACKGROUND

Endangered Species Act

11. The Endangered Species Act (“ESA”) provides several procedural and substantive protections for any species listed as either threatened or endangered, as well as for that specie’s habitat. These protections include: (1) the Section 7 duty on federal agencies to “consult” with the FWS before undertaking any action that may affect a listed species, 16 U.S.C. § 1536(a)(2); (2) the Section 7 prohibition against jeopardizing the continued existence of listed species or destroying or adversely modifying critical habitat, *id.* § 1536(a)(2); (3) the Section 9 prohibition against “taking” individual members of a listed species, which applies comprehensively to all “persons,” *id.* § 1538(a)(1)(B); (4) the Section 10 requirement that FWS ensure the submittal of an adequate conservation plan prior to approval or issuance of an incidental take permit, *id.* § 1539(a)(2)(A); and (5) the Section 10 requirement that any issued incidental take permit must ensure adequate protection of the species, *id.* § 1539(a)(2)(B).

12. Section 9 of the ESA states that it is unlawful for any person to “take” any animal species listed under the Act as endangered. *Id.* § 1538(a)(1)(B). The Act’s definition of “take” includes “harm,” *id.* § 1532(18), which FWS has further defined as including “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. By regulation, FWS has extended this take prohibition, including the prohibition against habitat modification, to animal species listed as threatened. *Id.* § 17.31(a).

13. Section 10 of the ESA provides an exception to the prohibition against the taking of endangered or threatened animal species. It authorizes the Secretary of the Interior to allow a person to engage in land use activities that may result in a taking of some members of a threatened or endangered

1 species, provided that the taking is "incidental to, and not the purpose of, the carrying out of an
2 otherwise lawful activity." The Secretary's approval is set forth in an incidental take permit ("ITP").

3 14. In order to qualify for an ITP, an applicant must submit a "conservation plan" (commonly
4 referred to as a Habitat Conservation Plan or "HCP") designed to minimize and mitigate the impact of
5 development and other permitted activities on protected species. The HCP must include a discussion of
6 the potential impact of the taking, identifying the steps the applicant will take to minimize and mitigate
7 those impacts and the funding that will be available to implement such steps, set forth alternatives to the
8 taking that were considered and the reasons for not choosing them, and set forth other measures the
9 Secretary may require. 16 U.S.C. § 1539(a)(2)(A).

10 15. The Secretary will issue an ITP, after public review and comment, if she finds that:

11 (a) "the taking will be incidental";

12 (b) "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of
13 such taking";

14 (c) the applicant will ensure that "adequate funding" will be provided for the plan;

15 (d) the taking "will not appreciably reduce the likelihood of the survival and recovery of the
16 species in the wild"; and

17 (e) other required measures will be met.

18 *Id.* § 1539(a)(2)(B).

19 16. Through regulations, FWS has authorized the inclusion of listed plant species and unlisted
20 plant and animal species in HCPs if the HCP satisfies the ESA section 10(a)(2) statutory criteria with
21 respect to such species. 50 C.F.R. §§ 17.3, 17.22(b)(5) & (6), and 17.32(b)(5) & (6). Thus, under FWS
22 regulations, the requirements of Section 10(a)(2) apply to all species covered by an HCP and the
23 accompanying ITP, regardless of whether listed or unlisted and regardless of whether animal or plant.

24 17. Section 7(a)(2) of the ESA requires that each federal agency "shall, in consultation with and
25 with the assistance of the Secretary [of Interior], insure that any action authorized ... by such agency ...
26 is not likely to jeopardize the continued existence of any endangered or threatened species...." 16
27 U.S.C. § 1536(a)(2). These consultation and no-jeopardy requirements apply to FWS when it authorizes
28

1 action through an ITP. Pursuant to Section 7(a)(2), FWS carries out a consultation with itself to ensure
2 that the action authorized under the ITP will not likely jeopardize an endangered or threatened species.

3 18. Pursuant to Section 7(b) of the ESA, FWS must issue a biological opinion ("BO") setting
4 forth its determination of whether the ITP will cause jeopardy. 16 U.S.C. § 1536(b). FWS must use the
5 best available science in drafting the BO. *Id.* § 1536(a)(2).

6 19. The main purpose of the ESA is to provide for the recovery of listed species. Recognizing
7 that certain species of plants and animals "have been so depleted in numbers that they are in danger of or
8 threatened with extinction," *id.* § 1531(a)(2), Congress "provide[d] a means whereby the ecosystems
9 upon which endangered species and threatened species depend may be conserved." *Id.* § 1531(b).
10 Conservation is defined by the ESA to mean "all methods and procedures which are necessary to bring
11 any endangered species or threatened species to the point at which measures provided pursuant to this
12 chapter are no longer necessary." *Id.* § 1532(3).

13 20. To achieve the recovery goal, the ESA requires all federal agencies, including FWS, to
14 utilize their authorities by carrying out programs for the "conservation" of endangered and threatened
15 species. *Id.* § 1536(a)(1). In addition, FWS must develop and implement plans, commonly known as
16 recovery plans, for the conservation of each threatened and endangered species. *Id.* § 1533(f). Before
17 approving ITPs, FWS must ensure that the taking will not appreciably reduce the likelihood of species
18 recovery. *Id.* § 1539(a)(2)(B).

19 Administrative Procedure Act

20 21. The APA provides that any agency action that is "arbitrary, capricious, an abuse of
21 discretion, or otherwise not in accordance with law" is prohibited and shall be overturned by this Court.
22 5 U.S.C. § 706(2)(A). It also provides that the reviewing court shall compel agency action "unlawfully
23 withheld or unreasonably delayed." *Id.* § 706(1).

24 National Environmental Policy Act

25 22. NEPA requires a federal agency to prepare an EIS for any major federal action significantly
26 affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C); Kleppe v. Sierra Club, 427
27 U.S. 390, 394 (1976). NEPA's implementing regulations outline the factors to be considered in
28 determining whether an action "significantly" affects the environment. 40 C.F.R. § 1508.27(b); Sierra

1 Club v. U.S. Forest Service, 843 F.2d 1190, 1193 (9th Cir. 1988). "If substantial questions are raised
2 whether a project may have a significant effect upon the human environment, an EIS must be prepared."
3 Sierra Club v. U.S. Forest Service, 843 F. 2d at 1193 (citation omitted).

4 23. NEPA also requires a federal agency to "study, develop, and describe appropriate
5 alternatives to recommend courses of action." 42 U.S.C. § 4332(2)(E). FWS is required to consider a
6 reasonable range of alternatives, which must include a consideration of full protection of the resources in
7 question. Oregon Natural Desert Ass'n v. Singleton, No. C98-97-RE, 1998 WL 1048180 (D. Or. Nov.
8 3, 1998).

9 FACTUAL BACKGROUND

10 24. Pursuant to the ESA, Fieldstone/La Costa Associates and the City of Carlsbad, California,
11 applied to FWS for a permit to authorize the incidental take of listed species over a 30-year period. The
12 Plan area, encompassing approximately 1,955 acres in an area known as La Costa, is one of the best
13 natural habitats in the City of Carlsbad. The Plan area consists of two parcels and a portion of a
14 roadway site. The smaller of the two parcels (the "Northwest site") is approximately 662 acres in size
15 and is located adjacent to a golf course. The larger of the two parcels (the "Ridge site") is
16 approximately 1,278 acres and includes an area commonly referred to as Box Canyon. It is a majestic
17 steep canyon with San Marcos Creek flowing through its center into Batiquitos Lagoon and, eventually,
18 the Pacific Ocean. There are approximately 14 acres associated with the construction of a roadway in
19 the area.

20 25. There are numerous known species in the Plan area, and the area is suitable habitat for many
21 imperiled species, including the threatened coastal California gnatcatcher (*Polioptila californica*
22 *californica*) ("gnatcatcher"), endangered least Bell's vireo (*Vireo bellii pusillus*), endangered
23 southwestern willow flycatcher (*Empidonax traillii extimus*), endangered Pacific pocket mouse
24 (*Perognathus longimembris pacificus*), endangered Del Mar manzanita (*Arctostaphylus glandulosa* ssp.
25 *Crassifolia*), threatened thread-leaved brodiaea (*Brodiaea filifolia*), endangered Encinitas coyote bush
26 (*Baccharis vanessae*), threatened California red-legged frog (*Rana aurora draytonii*), endangered quino
27 checkerspot (*Euphydras editha quino*), and endangered Orcutt's spineflower (*Chorizanthe orcuttiana*).
28 The Plan area represents the western-most portion of the third largest coastal sage scrub community,

1 prime gnatcatcher habitat, in San Diego County, more than 11,000 acres in total area. BO at 13. The 48
2 pairs of gnatcatchers in the Plan area represent about 16 percent of that population. *Id.* The City of
3 Carlsbad contains concentrations of Del Mar manzanita that represent "about 46 to 53 percent of all the
4 Del Mar manzanita in San Diego County." *Id.* at 14. "Approximately 1,025 Del Mar manzanita plants
5 occur on the Northwest parcel. This population is one of only two that has more than 1,000
6 individuals." *Id.* at 15.

7 26. Pursuant to the ESA, the applicants prepared an HCP, which was completed on or about
8 June of 1995. The HCP is intended to cover 63 species in total. FWS prepared an EA concerning the
9 plan. After issuing the EA for public comment, FWS received several critical comments concerning the
10 plan and the EA. On June 6, 1995, FWS issued a FONSI, determining that issuance of the ITP would
11 not have a significant effect on the environment. FWS issued the BO and ITP on June 6, 1995. The
12 BO, HCP, ITP, EA and FONSI failed to consider practicable alternatives and mitigation that would
13 reduce the negative environmental effects associated with the plan.

14 27. The BO states in part that "coastal sage scrub is considered to be one of the most depleted
15 habitat types in the United States." BO at 13. "Due to the uncertainty of gnatcatcher population
16 viability in the City of Carlsbad, [FWS] recommends that any unavoidable loss of gnatcatcher pairs
17 should be concentrated in areas of lower long-term viability and should be balanced by preservation of
18 the largest, most contiguous patches of gnatcatcher habitat." *Id.* at 13. Nevertheless, the BO and ITP
19 allow the direct take of 63 percent of on-site gnatcatchers. Approximately 42 percent of coastal sage
20 scrub will be destroyed. Although FWS failed to consider indirect effects, had it done so, it would have
21 seen that almost 100 percent of on-site Del Mar manzanita will be taken. An NCCP Scientific Review
22 Panel has recommended that the target width for wildlife corridors be approximately 1,200 feet, yet the
23 BO and ITP allow much narrower corridors.

24 28. Although the BO and ITP were issued in 1995, no development activities have occurred on
25 the Plan area. On information and belief, the original project owners went bankrupt, and the area was
26 acquired by two banks. On information and belief, one of those banks subsequently sold its interest to
27 the other bank, which still owns the property. On information and belief, FWS has treated the BO and
28 ITP as if the rights and interests of the prior owner(s) were transferred to the new owner(s).

29. On January 23, 2001, the City of Carlsbad issued a draft Environmental Impact Report ("DEIR") addressing a proposed development project for the Plan area. Known as the Villages of La Costa project, it would allow development of 2,390 residential dwelling units, two community facility sites, a business park, a school site, a public park site, major road improvements, and associated infrastructure. Canyons Network and the San Diego Chapter of the Sierra Club submitted several critical comment letters concerning the proposed project and the DEIR. On information and belief, to date no decision has been reached on the proposed Villages of La Costa project or the DEIR, and no final EIR has been issued, and no work on the project has commenced.

FIRST CLAIM FOR RELIEF

(Violation of ESA Section 10(a)(2)(B)(ii) and APA Section 706(2)(A))

30. Plaintiffs incorporate by reference each of the allegations set forth in this Complaint as if set forth herein in full.

31. In issuing the BO and ITP and in approving the HCP and IA, Defendants acted arbitrarily and capriciously, abused their discretion, and otherwise acted not in accordance with law. Defendants' actions are not consistent with the ESA's requirement to ensure that the applicant, "to the maximum extent practicable, minimize and mitigate the impacts of [] taking" of species. 16 U.S.C. § 1539(a)(2)(B)(ii).

32. Defendants' actions allow the taking of listed species (including but not limited to the gnatcatcher, Del Mar Manzanita and thread-leaved brodiaea) yet impacts to those species are not minimized and mitigated to the maximum extent practicable. Defendants also failed to incorporate the best available science regarding appropriate minimization and mitigation measures for the covered species. For example:

(a) Defendants' actions will allow the "take" of 31 pair of gnatcatchers on-site, approximately 63 percent of the on-site population, including all of the gnatcatchers from the Northwest site. The area is recognized as the western-most portion of prime gnatcatcher habitat in San Diego County, an area covering more than 11,000 acres.

(b) Defendants' actions will allow the "take" of one of four recognized major populations of thread-leaved brodiaea. Indirect effects will have substantial impact on 97% of those individuals not

1 directly "taken." One FWS staff botanist noted that the "loss represents the largest contiguous available
2 potential habitat block for thread-leaved brodiaea in San Diego County."

3 (c) Defendants' actions allow the "take" of species not yet listed without adequate support in the
4 record for how those species will be affected or what needs the species have to be protected.

5 33. FWS failed to incorporate more protective minimization and mitigation measures into the
6 HCP despite the lack of any evidence in the record that more protective measures were impracticable.
7 FWS accepted minimization and mitigation measures that were less protective than those discussed in
8 the Villages of La Costa DEIR.

9 34. Defendants failed to consider numerous factors relevant to whether the applicants will
10 minimize and mitigate the impacts of permitted takings to the maximum extent practicable. FWS failed
11 to ensure the consideration and adoption of practicable alternatives that would reduce impacts to listed
12 species. The Villages of La Costa DEIR discussed at least two such alternatives.

13 SECOND CLAIM FOR RELIEF

14 (Violation of ESA Section 10(a)(2)(B)(iii) and APA Section 706(2)(A))

15 35. Plaintiffs incorporate by reference each of the allegations set forth in this Complaint as if set
16 forth herein in full.

17 36. In issuing the BO and ITP and in approving the HCP and IA, Defendants acted arbitrarily
18 and capriciously, abused their discretion, and otherwise acted not in accordance with law. Defendants'
19 actions are not consistent with the ESA's requirement that "the applicant will ensure that adequate
20 funding for the plan will be provided." 16 U.S.C. § 1539(a)(2)(B)(iii).

21 37. Defendants' actions allow the taking of listed species (including but not limited to the
22 gnatcatcher, Del Mar Manzanita and thread-leaved brodiaea) without ensuring adequate funding for
23 protection of listed species. For example:

24 (a) No long-term funding is assured for the maintenance and monitoring of the plan.

25 (b) The requirement to provide \$1 million in off-site property acquisition does not ensure that
26 the 240 acres discussed in the HCP will be purchased.

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THIRD CLAIM FOR RELIEF

(Violation of ESA Section 10(a)(2)(B)(iv) and APA Section 706(2)(A))

38. Plaintiffs incorporate by reference each of the allegations set forth in this Complaint as if set forth herein in full.

39. In issuing the BO and ITP and in approving the HCP and IA, Defendants acted arbitrarily and capriciously, abused their discretion, and otherwise acted not in accordance with law. Defendants' actions are not consistent with the ESA's requirement that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv).

40. Defendants' actions allow the taking of listed species (including but not limited to the gnatcatcher, Del Mar Manzanita and thread-leaved brodiaea) without ensuring that such actions will not reduce the likelihood of the survival and recovery of the species in the wild. Defendants' actions allow the "take" of species not yet listed without adequate support in the record for how those species will be affected or what needs the species have to be protected. Defendants failed to consider factors relevant to whether the HCP will appreciably reduce the likelihood of survival and recovery of the covered species.

For example:

(a) the survival and recovery needs of the covered species, including the habitat sizes, locations, configurations and other habitat conditions needed by each of the covered species for survival and recovery;

(b) the extent to which development activity permitted under the HCP would reduce the amount and quality of habitat needed by each of the covered species for survival and recovery;

(c) the extent to which the conservation measures called for by the HCP would fail to restore the amount and quality of habitat lost as a result of development activity permitted under the HCP; and

(d) the extent to which the anticipated "net loss" of habitat amount and quality would reduce the likelihood that each of the covered species will survive and recover.

FOURTH CLAIM FOR RELIEF

(Violation of ESA Section 10(a)(2)(A) and APA Section 706(2)(A))

41. Plaintiffs incorporate by reference each of the allegations set forth in this Complaint as if set forth herein in full.

42. In issuing the BO and ITP and in approving the HCP and IA, Defendants acted arbitrarily and capriciously, abused their discretion, and otherwise acted not in accordance with law. Defendants' actions are not consistent with the ESA's requirement that the applicant submit an adequate conservation plan for approval. 16 U.S.C. § 1539(a)(2)(A).

43. Defendants did not require the submittal of an adequate conservation plan prior to approval, including a plan that specifies: (i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) other measures necessary or appropriate for purposes of the plan. Defendants' actions allow the "take" of species not yet listed without adequate support in the record for how those species will be affected or what needs the species have to be protected. Among other things, the HCP does not reveal adequately impacts (including indirect and cumulative impacts) on gnatcatchers and other species.

FIFTH CLAIM FOR RELIEF

(Violation of ESA Section 7(a)(2) and APA Section 706(2)(A))

44. Plaintiffs incorporate by reference each of the allegations set forth in this Complaint as if set forth herein in full.

45. In issuing the BO and ITP and in approving the HCP and IA, Defendants acted arbitrarily and capriciously, abused their discretion, and otherwise acted not in accordance with law. Defendants' actions are not consistent with the ESA's requirement that the approved action "is not likely to jeopardize the continued existence of any endangered or threatened species." 16 U.S.C. § 1536(a)(2).

46. Defendants' actions allow the taking of listed species (including but not limited to the gnatcatcher, Del Mar Manzanita and thread-leaved brodiaea) without ensuring that such actions are not likely to jeopardize their continued existence. Defendants are engaging in actions "that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species. 50 C.F.R. § 402.02. Defendants have failed to consider numerous factors relevant to whether the HCP and ITP will likely reduce the likelihood of the survival and recovery of covered species.

1 Defendants also failed to use the best scientific data available, 16 U.S.C. § 1536(a)(2), 50 C.F.R. §
2 402.14(d), and made numerous conclusions in support of a no-jeopardy determination that lack support
3 in the record.

4 47. In reaching a no-jeopardy conclusion, Defendants improperly failed to consider the effects
5 of the action permitted. Regulations require evaluation of “the effects of the action and cumulative
6 effects on listed species.” 50 C.F.R. § 402.14(g)(3). “Effects of the action” are “the direct and indirect
7 effects of an action on the species or critical habitat, together with the effects of other activities that are
8 interrelated or interdependent with that action, that will be added to the environmental baseline.” *Id.* §
9 402.02. “Environmental baseline” means “the past and present impacts of all Federal, State or private
10 actions and other human activities in the action area, the anticipated impacts of all proposed Federal
11 projects in the action area that have already undergone ... Section 7 consultation, and the impact of State
12 or private actions which are contemporaneous with the consultation in process.” *Id.* “Cumulative
13 effects” mean “those effects of future State or private activities, not involving Federal activities, that are
14 reasonably certain to occur within the action area.” *Id.* “Action area” means “all areas to be affected
15 directly or indirectly by the Federal action and not merely the immediate area involved in the action.”
16 *Id.*

17 48. Defendants violated ESA requirements by failing to ensure proper analysis of direct and
18 indirect effects, interrelated and interdependent activities, the environmental baseline, and cumulative
19 effects. By arbitrarily concluding that the taking will not jeopardize the continued existence of covered
20 species, Defendants violated the ESA and the APA. Defendants’ actions allow the “take” of species not
21 yet listed without adequate support in the record for how those species will be affected or what needs the
22 species have to be protected.

23 SIXTH CLAIM FOR RELIEF

24 (Violation of NEPA Section 4332(2)(C) and APA Section 706(2)(A))

25 49. Plaintiffs incorporate by reference each of the allegations set forth in this Complaint as if set
26 forth herein in full.

27 50. On June 6, 1995, FWS issued a Finding of No Significant Impact (“FONSI”), claiming that
28 the approval and adoption of the HCP, BO, IA and ITP would not have a significant effect on the

1 environment. Rather than preparing and circulating an Environmental Impact Statement ("EIS"),
2 Defendants prepared only an Environmental Assessment ("EA"). In doing so, Defendants acted
3 arbitrarily and capriciously, abused their discretion, and otherwise acted not in accordance with law.
4 Pursuant to NEPA § 4332(2)(C), Defendants should have prepared an EIS, taking a "hard look" at
5 significant impacts on the human environment.

6 51. Among other things, Defendants' actions in approving and adopting the HCP, BO, IA and
7 ITP will involve the following impacts, each of which indicates a significant effect on the environment:
8 (1) both beneficial and adverse impacts; (2) effects on public health and safety; (3) unique
9 characteristics of the geographic area; (4) effects that are likely to be highly controversial; (5) effects
10 that are highly uncertain or involve unique or unknown risks; (6) the action may establish a precedent
11 for future actions with significant effects or represents a decision in principle about a future
12 consideration; (7) the action is related to other actions with individually insignificant but cumulatively
13 significant impacts; (8) the action may adversely affect districts, sites, highways, structures, or objects
14 listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction
15 of significant scientific, cultural, or historical resources; (9) the action may adversely affect endangered
16 or threatened species; and (10) the action threatens violation of Federal, State, or local law or
17 requirements imposed for the protection of the environment. *See* 40 C.F.R. § 1508.27(b).

18 SEVENTH CLAIM FOR RELIEF

19 (Violation of NEPA Section 4332(2)(E) and APA Section 706(2)(A))

20 52. Plaintiffs incorporate by reference each of the allegations set forth in this Complaint as if set
21 forth herein in full.

22 53. Defendants acted arbitrarily and capriciously, abused their discretion, and otherwise acted
23 not in accordance with law. Pursuant to the National Environmental Policy Act § 4332(2)(C),
24 Defendants were required to "study, develop, and describe appropriate alternatives to recommend
25 courses of action." 42 U.S.C. § 4332(2)(E). The EA failed to consider a reasonable range of
26 alternatives. The EA's consideration of alternatives skews its analysis in favor of adoption and approval
27 of the HCP, BO, IA and ITP.
28

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

3 A. Declare that the HCP, IA, BO and ITP are invalid and in violation of the ESA and APA;

4 B. Declare that the EA and FONSI are invalid and that Defendants' failure to prepare an EIS
5 is in violation of NEPA and the APA;

6 C. Grant a preliminary and permanent injunction directing Defendants to revoke the HCP,
7 IA, BO and ITP until all legal deficiencies have been corrected;

8 D. Grant a preliminary and permanent injunction directing Defendants to revoke the EA and
9 FONSI and barring Defendants from issuing a BO and ITP until an adequate EIS has been completed;

10 E. Award Plaintiffs their costs of suit, including reasonable attorneys' fees and expert
11 witness costs; and

12 F. Grant Plaintiffs such other relief as the Court deems just and proper.

13 DATED: May 30, 2001

Respectfully Submitted,

14 LAW OFFICES OF EVERETT DELANO

15
16 By: 

17 Everett L. DeLano III
18 Attorney for Plaintiffs
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20 SIERRA CLUB, and
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